No. 226.

United States Circuit Court of Appeals.

FOR THE NINTH CIRCUIT.

NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

JOHN McCORMICK,
Defendant in Error.

Brief for Plaintiff in Error.

C. W. BUNN,
Counsel for N. P. R. R. Co.

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STATEMENT OF FACTS.

The question for decision here is a very narrow one. Judgment was rendered on the pleadings in the court below in favor of the defendant John McCormick. Such a judgment could be rendered only on the theory that the pleadings made no issue of fact for trial. As against such a motion and on this writ of error the court must consider as established and true all the well pleaded facts in the complaint and replication of the plaintiff in error. And the allegations of McCormick's answer cannot be taken

as established except in so far as they are admitted by the complaint and reply.

Keeping these obvious conclusions in view let us see what was pleaded. That the plaintiff in error is a corporation under the act of congress of July 2, 1864, authorized to build a railroad from Lake Superior to Puget Sound by the Northern route; that it has built such road and earned the land grant provided in section 3 of the said act of July 2, 1864, is alleged in the complaint and not controverted by the answer. That the map of general route of said railroad through the territory of Montana was filed on the 21st of February, 1872, and that the definite route of said railroad through the territory of Montana was filed on the 6th of July, 1882, is alleged in the complaint and not controverted by the answer. That the land in question falls within an odd-numbered section, and is within forty miles of the said general route, and the said definite route is similarly alleged and admitted. It is also admitted in the pleadings that the land was in truth and fact agricultural and not mineral. It was therefore not excepted from the land grant because of its character. It is pleaded in the amended answer and not denied in the reply that the land was public unsurveyed land of the United States, and that in 1884 the public surveys were made and accepted by the Land Department.

Next, as to facts which are controverted in the

pleadings, but which must be conceded, for the purposes of this argument, to be as the plaintiff in error alleged them. The complaint alleges that at the date of the location of the general route in 1872, and at the date of definite location in 1882, the land in question was public land of the United States to which it had the full title, not reserved, sold, granted, or otherwise appropriated and free from pre-emption or other claims or rights. The answer and amended answer on the other hand deny this fact, and allege that in January, 1864, one Higgins entered into possession of the land, finding it then unappropriated; that he erected improvements and enclosed a portion thereof with a fence; that thereafter he continued to occupy and possess the same until he sold his interest to other parties, and through *mesne* conveyances the defendant, McCormick, on or about the 6th of January, 1881, became the owner and possessor of the Higgin's claim to said land; that the land has been occupied continuously from the first day of July, 1862, up to the time of the commencement of this action by persons who were entitled to enter the same as a homestead or pre-emption; that on the 6th of January, 1881, the said McCormick settled upon said tract of land, having become the possessor thereof by purchase from the said prior occupant. These allegations are controverted and put in issue both by the complaint as above shown and by para-

graphs I, II, III, IV, V, VA and VI, of the reply. So that for the purposes of the motion for judgment on the pleadings the fact must be considered as established that there was no occupation either by McCormick or Higgins or any other person prior to the time when the definite route map was filed. Therefore the question which might have arisen in this case had it gone to trial—whether mere occupation of unsurveyed public land constitutes such an attachment thereto of a homestead or pre-emption right that the land became excepted from the railroad grant—cannot arise on this hearing. Here it is established for the purposes of this argument that the land was vacant and always had been when the route of the railroad was definitely fixed.

The particular allegation of the pleadings on which judgment was ordered below and upon which said judgment must be sustained if it is sustained at all is this; the amended answer alleges that sometime after January 6, 1881, (the time is not stated) McCormick applied in the United States land office at Helena to file his pre-emption on said land; that he appeared on said application as did the plaintiff in error and contested the filing; that after hearing and full proof the Register and Receiver decided that McCormick "was entitled" to enter said land under the laws of the United States and that "the plaintiff herein had no right, title or interest therein, the said land being reserved

from the grant alleged in plaintiff's complaint herein filed." See Record, pages 23-24. The amended answer further alleges in this regard that the decision in the Land Office at Helena was appealed from to the Commissioner of the General Land Office and then to the Secretary of the Interior who affirmed the decision of the local land officers and decided "that this defendant was entitled to hold and possess said land under the laws of the United States, and that the plaintiff herein had no right, title, interest, claim or demand whatsoever in or to said land or any part or parcel thereof." Record, pages 24-25. The amended answer then goes on to allege that McCormick filed his declaratory statement with the Register and Receiver at Helena to pre-empt said land on the first day of May, 1889; that he afterwards changed his pre-emption entry to homestead entry and paid the Register and Receiver the necessary fees therefor; that on the 20th of March, 1891, he made final proof in the regular way and that the plaintiff in error made no objections or protest to said proof; that the said proof was accepted by the land officers and a patent issued to the defendant McCormick on the 16th day of November, 1891.

The pleadings of the plaintiff in error as before shown demonstrate the fact to have been (so far as this hearing is concerned) that at the time of the said contest in the Land Department and at the

time of said pre-emption and homestead entry and at the time of said patent the land was not public land of the United States: that being an odd-numbered section of vacant land not reserved and to which no pre-emption or homestead right had attached, it became the land of the Northern Pacific Railroad Company under its grant on the 6th day of July, 1882. The reply therefore alleges what it was perhaps entirely unnecessary to allege, the facts justifying the conclusion having already been pleaded. that at the times when the land department took the said actions the land was not public land and the department had no jurisdiction over the same.

ARGUMENT.

The question for decision is this. Whether—conceding the land to have been vacant agricultural land subject to no reservation, or homestead, or pre-emption, or other right at the time when the route of the road was definitely fixed, and therefore conceding what follows, that the land *instanter* on the filing of said definite route map became the absolute property of the railroad company—the land department decision as pleaded in the amended answer is conclusive; whether such decision prevents the United States courts from considering the case on its merits. The judgment in the court below rests alone on the force

and effect of the land department decision as pleaded. Unless that decision as pleaded is conclusive the judgment must be reversed. And we submit that no proposition is better settled in the law, than that the decisions of the department are extra judicial and null and void, when they concern land which is not a part of the public domain, but which has passed into private ownership The decisions of the land department are conceded to be conclusive "as to matters of fact properly determinable by them." *Bardon* v. *N. P. R. R. Co.*, 154 U. S., 327. But on the other hand it is equally well settled that the decisions of the department as to the law are not conclusive and of no binding force or effect on the courts; and that their decisions as to either fact or law upon private property not a part of the public domain are extra judicial, null and void.

All that is shown in the amended answer is that the land officers held that the defendant "was entitled to enter the above described land under the laws of the United States, and that the plaintiff had no right, title or interest therein." It is not pleaded that there was any issue of fact before the land department, or that the land department decision was upon a question of fact. The pleading is entirely insufficient to show that the department had any jurisdiction. It is not shown or claimed that McCormick or his predecessor had a filing

against the land when the definite route map was filed. Neither is it shown or alleged that the inquiry before the department related to the facts concerning McCormick's alleged possession or that of his predecessor. For aught that appears, and indeed in view of the other allegations, it must be considered as established, the decision of the land department was merely that McCormick was entitled to enter and preempt a piece of land which was plainly and absolutely the property of the railroad company at the time. In other words the defendant's pleading shows this decision to have been simply a ruling upon the law, and more than this, an erroneous and void ruling for want of jurisdiction. It is simply begging the question to say that the department decision conclusively settled the title to be in McCormick or that the patent had that effect. For the very question at issue in this action is whether the land was public land or railroad land at the time the department decision was made. If it was railroad land the decision was void, if it was public land not covered for any reason by the railroad grant this plaintiff cannot succeed before the court in this action. In that event McCormick does not need the decision; it adds no force to his right or title. If the land was our land when the decision was made the department ruling was extra judicial and void. Therefore we submit that the department ruling and the patent are utterly

immaterial in this case until the court tries and decides the question whether the land became our land on the filing of the map of definite location, which was before the department decisions were made.

The authorities to sustain our contention will be fully cited in Mr. Dudley's brief filed herewith.

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